IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15392 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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NATVARLAL SHIVLAL MODHA - Petitioner(s)
Versus
PUSHPABEN NATVARLAL MODHA - Respondent(s)

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Appearance :
MR YOGESH S LAKHANI for Petitioner(s) : 1,
DHARMESH D NANAVATY for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 14/06/2007

ORAL JUDGMENT

1. The petitioner – husband has filed this petition under Article-227 of the Constitution of India challenging the order passed by the learned Civil Judge (S.D.) Porbandar on 17.9.2003 in an application Ex.24 of the Hindu Marriage Act preferred by the present respondent – original defendant in H.M.P. No.35 of 2000 whereby the application Ex.4 was partly allowed and the present petitioner was directed to pay monthly maintenance amount of Rs.10,000/- to the respondent and Rs.25,000/- towards the cost of the litigation.

2. It is the case of the petitioner that the present respondent has filed H.M.P. No.35 of 2000 before the learned Civil Judge (S.D.)

Porbandar under Section-9 of the Hindu Marriage Act for restitution of conjugal rights wherein she has preferred an application under Section-24 of the Hindu Marriage Act for getting interim maintenance during the pendency of H.M.P. No.35 of 2000. The said application was given below Ex.4 and the same came to be partly allowed by the learned Civil Judge (S.D.) Porbandar on 17.9.2003 and thereby granted interim maintenance of Rs.10,000/- p.m. and also awarded cost of Rs.25,000/-.

3. Being aggrieved and dissatisfied by the said order dated 17.10.2003 the petitioner has filed this petition under Article-227 of the Constitution of India.

4. This Court has issued notice on 2.12.2004 on condition that the petitioner shall deposit 25% of the amount due and payable by the petitioner vide order dated 17.9.2003

with this Court and on further condition that the petitioner should deposit an amount of Rs.10,000/- by way of costs of the respondent – wife. On this condition the order passed by the learned Civil Judge (S.D.) Porbandar was stayed by this Court. On 26.4.2005 petition was dismissed for default and interim relief was vacated. It was, thereafter, restored on 11.5.2005. Rule was issued by this Court and interim relief in terms of para-7(c) of the petition was granted on condition that the petitioner shall pay the amount of arrears i.e at the rate of Rs.3,000/- per month till date to the respondent – wife. The Court has also observed that this amount has been fixed as per the order dated 11.8.2000 passed by the learned Civil Judge (S.D.) Porbandar. It was made clear that if the amount of arrears is not deposited, it shall be open to the respondent to move an application for vacating interim relief. The petition was

again dismissed for default on 16.8.2005 and interim relief granted was vacated. The petition was thereafter restored and on 28.9.2005 another order is passed and this Court has observed that the learned advocate for the petitioner was not present. The Court further observed that the learned advocate for the petitioner was consistently not remaining present. The matter was allowed to get dismissed for non-prosecution and thereafter, by filing an application for restoration, it was got restored. This Court has also taken note that it was for the 3rd consecutive time the matter was on board, but the learned advocate for the petitioner was not present. The Court has further observed that the Court vide its order dated 6.9.2005 in Misc. Civil Application No.1604 of 2005, not only restored the Special Civil Application to its original file, but also restored all the orders passed therein in favour of the petitioner. Thereby, the

execution proceedings filed by the respondent did not proceed further and despite order dated 17.9.2003, whereby the learned Civil Judge (S.D.) Porbandar partly allowed the application Ex.4 directing the respondent to pay monthly maintenance at the rate of Rs.10,000/- to the present respondent and Rs.25,000/- towards the cost of the litigation, remains unimplemented.

5. After recording the aforesaid submission, the Court vacated the interim relief and matter was adjourned to 19.10.2005. On 19.10.2006, the Court has fixed up the matter for final hearing on 26.10.2005 with a clear understanding that on that date at any excuse the matter will not be adjourned. The Court has further observed that the stay operating till today i.e. 19.10.2005 shall continue till then i.e. upto 26.10.2005. The net effect of this order is that the interim relief was in operation till 26.10.2005.

Thereafter, there was no interim relief. The matter could not be taken up for final hearing.

6. Mr.V.G.Dave, and Mr.Ashish Dagli, learned advocates appearing for Mr.Y.S.Lakhani, learned advocate for the petitioner have submitted that the learned trial Judge while passing the order below Ex.4 has himself mentioned in his order that the petitioner has appeared before the Court and prayed for adjournment and yet the learned trial Judge has passed an order to proceed Ex.4 application ex parte against the petitioner. He has further submitted that the Ex.4 application was decided ex parte and there was no opportunity given to the petitioner for opposing the Ex.4. He has further submitted that the petitioner has filed his V.P at Ex.9 on 12.6.2001 though he had appeared through his advocate by way of filing V.P at Ex.9 the learned Judge has not

considered the said aspect and has ordered to decide Ex.4 application exparte and his adjournment application was also rejected. He has, therefore, submitted that without giving an opportunity of opposing Ex.4 application and producing sufficient evidence and without taking into consideration the V.P. filed by the present petitioner he has decided Ex.4 application exparte.

7. Mr.Dagli and Mr.Dave have further submitted that the respondent has suppressed material facts before the learned Civil Judge while deciding application for interim maintenance and had not disclosed the fact that she had preferred an application Ex.5 in Special Civil Suit No.7 of 2000 before the learned Civil Judge (S.D.), Porbandar and while passing an order below an application Ex.5, the learned Civil Judge has granted maintenance of Rs.3,000/- and also awarded Rs.15,000/- as cost of the proceeding and,

therefore, there is a bar of res judicata to entertain separate application preferred by the present respondent for interim maintenance. Mr.Dagli has further submitted that the present petitioner has also moved restoration application before the learned Civil Judge, Porbandar and the same is still pending. However, since the respondent has filed execution proceeding and warrant was issued the present petition was required to be filed before this Court. He has, therefore, submitted that considering exparte order passed by the learned Civil Judge and considering the fact that the respondent has concealed the material fact of awarding maintenance of Rs.3,000/- in earlier proceeding, this Court should quash and set aside the impugned order so as to give opportunity to the petitioner to defend his case before the learned Civil Judge.

8. Mr.Dharmesh D. Nanavati, learned advocate

appearing for the respondent on the other hand has submitted that proper opportunity has been given to the petitioner and the same has not been availed of by him. He has further submitted that earlier restoration application was moved by the petitioner before the learned Civil Judge in the month of June, 2005 and the same was withdrawn in December, 2005 and thereafter adjournments were sought for, which were also granted by the learned Civil Judge and still objections were not filed by the petitioner before the learned Civil Judge and ultimately the order came to be passed by him. He has, therefore, submitted that it is not open for the petitioner to raise a dispute before the Court that the impugned order is passed exparte without affording any opportunity to the petitioner. He has further submitted that the petitioner is staying at Dubai and even in the divorce petition filed by him before the learned Civil Judge, Porbandar, he

did not remain present. He has further submitted that there are various properties and fabulous income, which he is earning at Dubai and hence considering his wealth and income the trial Court has passed an order of Rs.10,000/- per month by way of interim maintenance, which should not be interfered with by this Court. He has further submitted that even otherwise the matter is still pending before the learned trial Judge. This Court while exercising writ jurisdiction under Article-227 of the Constitution of India should not interfere with the order passed by the learned trial Judge.

9. After having heard the learned advocates appearing for the respective parties and after having gone through the impugned order passed by the learned trial Judge below an application Ex.4, for interim maintenance as well as earlier order passed by him in the suit filed by the present respondent for

restitution of conjugal rights, the Court is of the view that the adequate opportunity has not been granted by the Court to the petitioner and in his absence the impugned order of awarding amount of Rs.10,000/- by way of maintenance was passed. Even material fact with regard to the earlier order awarding the maintenance of Rs.3,000/- per month was not disclosed by the respondent in her subsequent application, wherein the present order is passed. It is true that as against the claim of Rs.18,000/- per month of the respondent the order was passed awarding the maintenance of Rs.10,000/- per month, but in any case the principle of natural justice demands that before passing any order the party against whom such order is passed is required to be heard. Taking any view of the matter, the Court is of the view that the matter is required to be heard afresh and hence the impugned order passed by the learned Civil Judge (S.D.) Porbandar is

hereby quashed and set aside with a direction to hear the application Ex.4 for maintenance afresh. However, before the application is heard, the petitioner is hereby directed to deposit arrears of maintenance awarded by the Court at the rate of Rs.3,000/- per month. The amount which has been deposited by him till this date be deducted and balance amount be deposited before the trial Court within the period of two weeks and the amount of cost which is awarded at the rate of Rs.25,000/- and further cost of Rs.15,000/- for the present proceeding be also deposited before the trial Court within the period of two weeks from the date of receipt of the writ of this order or from the date of receipt of certified copy, which ever is earlier. It is made clear that on depositing the above amount the application Ex.4 would be heard afresh. The deposit of the amount of 25% due and payable by the petitioner under the order dated 17.9.2003 passed at the

time of issuance of notice on 2.12.2004 is subject to the final outcome of the application, which is to be heard by the trial Court afresh.

10. Subject to the aforesaid observations and directions this petition is accordingly disposed off. Rule is made absolute to the aforesaid extent without any order as to costs.

(K. A. PUJ, J.)

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